

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

MARISOL G.,

Claimant,

vs.

EASTERN LOS ANGELES REGIONAL
CENTER,

Service Agency.

OAH No. 2010090211

DECISION

Administrative Law Judge Deborah M. Gmeiner of the Office of Administrative Hearings heard this matter on July 14, 2011, in Alhambra, California.

Marisol G. (Claimant) was represented by her father, Juventino G. (father) and her mother Lisa Navarro G. (mother)¹ Claimant did not attend the hearing.

Judy Castaneda, Fair Hearing Coordinator, represented Eastern Los Angeles Regional Center (ELARC, Regional Center or Service Agency). Also present was Karen Sibrian, Service Coordinator.

Oral and documentary evidence was received. The matter was submitted for decision at the conclusion of the hearing.

¹ Claimant and her parents are identified by first name and last initial to protect their privacy.

ISSUE

Did the Service Agency properly reduce funding for Claimant's adaptive skills training program from 25 hours per week to 16.25 hours per week?

FACTUAL FINDINGS

1. Claimant is a bright and happy nine-year-old girl who lives with her mother, father and three younger siblings. She has Down syndrome and is eligible for Regional Center services on the basis of mild to moderate mental retardation. Claimant is in good overall health. She does have some behavioral challenges, including aggression with peers. Mother and father are teachers. Mother has a master's degree in special education and is a special education teacher.

2. Since August 9, 2007, Claimant has been receiving adaptive skills training services from a community facilitator provided by Jay Nolan Community Services (Jay Nolan). As of August 2010, Service Agency was funding 25 hours per week of services. Services are provided in the Claimant's home and in the community.

3. On August 9, 2010, Service Agency informed Claimant that it would no longer fund 8.75 hours per week of adaptive skills training. Service Agency determined that 8.75 hours per week of services constituted social/recreational activities. Service Agency determined that such activities were subject to the Trailer Bill enacted on July 28, 2009 (Trailer Bill), which imposed a variety of funding limitations on Regional Centers, including those found at Welfare and Institutions Code sections 4648.5 and 4646.4, subdivision (a)(4).² Claimant was informed of her right to appeal. Claimant filed a Fair Hearing Request on August 14, 2010. This hearing ensued.

4. In addition to the adaptive skills training provided by Jay Nolan, Claimant receives 24 hours of respite each month and four hours of after school day care. Parents share the costs of day care services. Claimant attends school six hours per day in a general education classroom. She has a classroom aide at school, where she also receives occupational therapy and speech and language services. Claimant has a behavioral support plan in school.

5. Neither party offered Claimant's Individual Program Plans (IPP) for 2007 and 2008 into evidence. The first report describing Claimant's involvement in the Jay Nolan program was the May 2009 progress report prepared by that agency. At the time Claimant was receiving 115 hours per month of community facilitator support in order to "build social skills and continue to learn everyday living skills." Services were offered in the

² All further references are to the Welfare and Institutions Code unless otherwise indicated.

following areas: daily living skills, behavior, communication, community participation/recreation and leisure, and health and safety. No specific objectives were provided.

6. According to mother, in 2009, at the recommendation of Claimant's service coordinator supervisor, Jay Nolan added recreational services to Claimant's schedule. This change was intended to minimize the risk that the number of service hours would be reduced. On September 4, 2009, mother provided a schedule of daily activities Claimant participated in with Jay Nolan (September 2009 calendar). These included the following activities:

Monday	6:00-7:00 p.m.	Basketball practice
Tuesday	5:30-6:30 p.m.	Tae Quan Do
Wednesday	5:30-6:15 p.m.	Swim lesson
Thursday	5:30-6:30 p.m.	Tae Quan Do
Friday	6:00-7:30 p.m.	Basketball game
Saturday	9:30-10:45 a.m.	Swim lesson

7. According to Claimant's November 18, 2009 IPP, Claimant enjoys sports and recreational activities. She is able to initiate play interactions on some occasions and maintain play interactions for short period of time. Her aggressive behaviors, inability to wait her turn, and frustration at not being able to communicate interfere with her social activities. The IPP described the services Jay Nolan was providing, as reported in the May 2009 progress report. Claimant's swimming lessons were terminated due to the Trailer Bill. Mother was also informed that Service Agency would not fund summer camp due to the Trailer Bill. Mother expressed disagreement with this decision, but did not appeal it.

8. In its December 2009 progress report, Jay Nolan reported Claimant was receiving the services of a community facilitator for five hours per day, five times per week so that Claimant "may build social skills and continue to learn everyday life skills." This was the same goal as expressed in the May 2009 progress report. Services were offered in the following areas: daily living skills, relationships, choice/autonomy, communication, behavior and health and safety, and community participation. Each area included a specific objective. In the areas of health and safety, community participation, communication, and behavior the descriptions of Claimant's functioning and the interventions utilized by the community facilitator remained substantially the same as described in the May 2009 progress report. The emphasis on daily living skills was reduced and the areas of choice/autonomy and relationships were added.

9. In the July 2010 progress report, Jay Nolan reported the same level of service and the same goals as described in the December 2009 progress report. Jay Nolan continued to provide services in the same areas of functioning. The only specific objective that changed was in the area of daily living skills. In addition, Jay

Nolan described some improvement in Claimant's behavior at school as reported by her mother.

10. On July 20, 2010, Ms. Sibrian (Sibrian), the Regional Center service coordinator assigned to Claimant, requested that Kim Henry (Henry), Claimant's Jay Nolan Family Support Coordinator, provide a breakdown of hours of service provided to Claimant. Sibrian also asked Henry to address the objectives for community participation and relationship which appeared duplicative. Henry responded to Sibrian on the same day, describing Jay Nolan services between 5:30 p.m. and 9:30 p.m. Monday through Friday and from 8:30 a.m. through 11:30 a.m. on Saturday. Henry listed the same sports activities as mother listed in her September 2009 calendar. However, according to mother, the sports activities had been eliminated in June 2010. She thought that Henry's email was sent in haste and that she had probably cut and pasted the schedule from an earlier email about Claimant's schedule.

11. Sibrian considered both the September 2009 calendar prepared by mother and Henry's estimate of time devoted to sports in determining that such activities comprised 8.75 service hours each week. This calculation was used to reduce the number of service hours Jay Nolan was authorized to provide Claimant. Sabrian was also concerned that the Jay Nolan services were not being provided in a cost effective way. She was specifically concerned that that there was no baseline provided, no plan for parent participation in the service, no plan for implementing the objectives, and no plan to adjust goals if the current plan was not working or a goal was not achieved.

12. In September 2010, Jay Nolan convened an Individual Service Plan team (ISP), comprised of mother and father, Henry and two other support staff. Sabrian was not invited to participate. The ISP team developed a new ISP. In September 2010, Jay Nolan also provided a progress report detailing the level of service it was providing to Claimant. The September 2010 progress report identified the dual goals of Claimant continuing to learn necessary life skills to assist her in functioning like her typical peers, and for Claimant to continue to live at home. This was the first time the goals addressed maintaining Claimant in her own home. Most areas contained more detailed objectives than were included in earlier reports. An objective for personal hygiene was added. Several of the skills addressed in this category were previously found under daily living skills. The goals outlined under community participation were related to the goals in socialization and health and safety. The goals and objectives were changed to address the Service Agency's decision to reduce the number of weekly service hours.

13. Sabrian thought that if Jay Nolan was reducing service in the area of social/recreation functioning, then there was no reason to continue the same number of hours of services. Sabrian believed that Jay Nolan had modified the goals in September 2010 in order to maintain the same level of service hours despite the Service Agency decision to reduce those services by 8.75 hours per week. Jay Nolan did not consult with Sabrian when it made these changes to the ISP, something that Sabrian found unusual because most

agencies consulted with her when changing consumer service plans. Sabrian also thought that only in rare circumstances would a child be in need of adaptive skills training. She believed that the hygiene and self help skills Jay Nolan was working on were the responsibility of the parent. Sabrian also believed that it was not cost effective to continue to fund adaptive skills services beyond two to three years. The Service Agency had offered Claimant behavior modification services as a more cost effective way to address Claimant's behavioral challenges. Claimant's mother had declined those services, citing a lack of need for such services. Mother testified she did not believe the behavior modification services Claimant received in 2006 were effective.

LEGAL CONCLUSIONS

1. The Lanterman Act governs this case. (§ 4500 et seq.)
2. The standard of proof in this matter is a preponderance of the evidence. The Service Agency bears the burden of proof. (Evid. Code, §§ 115 and 500.)
3. Under the Lanterman Act, regional centers are charged with carrying out the state's responsibilities to the developmentally disabled. (§ 4620, subd. (a).) The Lanterman Act describes the state's responsibility to provide services and supports for developmentally disabled individuals.
4. The Lanterman Act also provides that "[t]he determination of which services and supports are necessary for each consumer shall be made through the individual program plan process. The determination shall be made on the basis of the needs and preferences of the consumer, or when appropriate, the consumer's family, and shall include consideration of a range of service options proposed by individual program plan participants, the effectiveness of each option in meeting the goals stated in the individual program plan, and the cost-effectiveness of each option." (§ 4512, subd. (b).) While regional centers have a duty to provide a wide array of services to implement the goals and objectives of the IPP, they are also directed by the Legislature to provide the services in a cost-effective manner. (§§ 4512, subd. (b), 4640.7, subd. (b), and 4646, subd. (a).) In implementing an IPP, a regional center is to first consider services and supports in the natural community, home, work, and recreational settings. (§ 4648, subd. (a)(2).)
5. In 2009, in response to the state's fiscal crisis, the legislature enacted the Trailer Bill limiting certain services regional centers may provide to their consumers. Service Agency cited the Trailer Bill and in particular sections 4648.5 and 4646.4 (a) (4) in support of its decision to terminate 8.75 hours of Jay Nolan adaptive living skills training.

6. Section 4648.5 provides in pertinent part:

(a) Notwithstanding any other provision of law or regulations to the contrary, effective July 1, 2009, a regional centers' authority to purchase the following services shall be suspended pending implementation of the Individual Choice Budget and certification by the Director of Developmental Services that the Individual Choice Budget has been implemented and will result in state budget savings sufficient to offset the costs of providing the following services:

[¶] . . . [¶]

(2) Social recreation activities, except for those activities vendored as community-based day programs.

[¶] . . . [¶]

(c) An exemption may be granted on an individual basis in extraordinary circumstances to permit purchase of a service identified in subdivision (a) when the regional center determines that the service is a primary or critical means for ameliorating the physical, cognitive, or psychosocial effects of the consumer's developmental disability, or the service is necessary to enable the consumer to remain in his or her home and no alternative service is available to meet the consumer's needs.

7. A “social recreation program” is defined as “a community-based day program which provides community integration and self-advocacy training as they relate to recreation and leisure pursuits.” (Cal. Code. Regs., tit. 17, §§ 54302, subd. (a)(64) and 56702.)

8. Section 4646.4(a) (4), also relied on by Service Agency, requires that the Service Agency take into consideration: “[T]he family's responsibility for providing similar services and supports for a minor child without disabilities . . .” when developing, reviewing or modifying the IPP.

9. Applying those provisions here, Claimant’s appeal must be denied. Service Agency has met its burden of proof that 8.75 hours out of the 25 hours of adaptive skills training are social/recreational services within the meaning of Section 4648.5. Claimant’s assertion that the terminated services were not social/recreational activities is not supported by the evidence. Mother’s calendar and Henry’s hourly breakdown clearly support Service Agency’s characterization of the sports activities as social/recreational activities. Sports activities such as swimming, Tae Quan Do, and basketball are primarily social/recreational activities. While mother correctly points out that Claimant receives benefit from such services, and that in the course of participating in such services, acquires adaptive living

skills, that benefit is not sufficient to find an exception under section 4648.5. There is no evidence that the service is the primary or critical means to ameliorate the effects of Claimant's disability. Notwithstanding the language in the Jay Nolan September 2010 progress report about the goal of maintaining Claimant in her own home, there is no substantial evidence that the social/recreational activities provided by Jay Nolan are necessary to achieve that goal.

ORDER

Claimant's request to reinstate 8.75 hours per week of adaptive skills training provided by Jay Nolan Community Services is denied. The Service Agency may reduce Claimant's funding for Claimant's adaptive skills training program from 25 hours per week to 16.25 hours per week.

Dated: July 25, 2011

DEBORAH M. GMEINER
Administrative Law Judge
Office of Administrative Hearings

NOTICE

Under the Lanterman Developmental Disabilities Services Act, this is a final administrative decision; both parties are bound by this decision. Either party may appeal this decision to a court of competent jurisdiction within 90 days.